No. 85-1090

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis; THE CITY OF INDIANAPOLIS; THE COUNTY OF MARION; THE DEPARTMENT OF ADMINISTRATION OF THE CITY OF INDIANAPOLIS; OFFICE OF EQUAL OPPORTUNITY OF THE CITY OF INDIANAPOLIS; EQUAL OPPORTUNITY ADVISORY BOARD OF THE CITY OF INDIANAPOLIS; and JOSEPH McATEE, Chief of Police; STEPHEN GOLDSMITH, Marion County Prosecutor, and JAMES WELLS, Marion County Sheriff,

Appellants,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS; FREEDOM TO READ FOUNDATION; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., KOCH NEWS COMPANY; NATIONAL ASSOCIATION OF COLLEGE STORES, INC.; OMEGA SATELLITE PRODUCTS CO.; VIDEO SHACK, INC.; and KELLY BENTLEY,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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APPELLEES' MOTION TO AFFIRM OR DISMISS

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The following information is supplied pursuant to Rule 28.1 of the Rules of this Court:

Plaintiff-Appellee Koch News Co. has been succeeded by Indiana Periodicals Distributor, Inc. since the completion of the proceedings below. To avoid confusion we will continue to refer to Koch News Co. by its original name, which was the one used in the pleadings below. Buckeye News Co. is the parent company of Indiana Periodicals Distributor, Inc.

Plaintiff-Appellee Omega Satellite Products Co. has the following affiliates:

Bluffton Cable TV
Cable Brazil
Cablevision Alma
Cablevision Ludington
Cablevision Mt. Pleasant
Cablevision St. John's
Cardinal Telecable
Clear Channels Cable TV
Decatur Cable
DeKalb Cable
Diamond Lake Cable
Hoppeston Cable TV
Hoosier Hills Cable TV
Mineral Area Cablevision
Omega of Brown County
Omega of Michigan Cable
Omega of Zionsville Cable
Paw Paw Lake Cable
Rollo Cable Systems Inc.
See-More TV Company
Omega Satellite Products Company of Indianapolis
Omega Satellite Products Company of Mt. Pleasant

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Selected Provisions of the Code of Indianapolis and Marion County, Indiana	iv
Motion and Summary of Argument	1
Statement of the Case	1
The Appellees	4
Argument	
Point I—The Lower Courts Properly Found That The Amendement Is Irretrievably and Unconstitutionally Vague	6
Point II—The Constitution Clearly Prohibits Content-Based Bans On First Amendment Protected Materials Deemed By Some To Be "Offensive"	14
Point III—Under Clear Precedent Of This Court, Appellees Have Standing And State A Concrete Case and Controversy	23
Point IV—Even If The Issue Of Abstention Were Properly Before The Court, Abstention Would Not Be Appropriate Here	26
Conclusion	28

TABLE OF AUTHORITIES

Cases: PAGE

American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) 24

Baggett v. Bullitt, 377 U.S. 360 (1964) 12
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 24
Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985) 27

Carey v. Population Services, Int'l, 431 U.S. 678 (1977) 15–16
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 16
Church of Scientology of California v. Flynn, 578 F. Supp. 266 (D. Mass. 1984) 20
Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 438 U.S. 916 (1978) 16

England v. Louisiana State Board, 375 U.S. 411 (1964) 28

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 21

Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984) 26–28

Laird v. Tatum, 408 U.S. 1 (1972) 23

Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) 20
Miller v. California, 413 U.S. 15 (1973) 16–17

NAACP v. Button, 371 U.S. 415 (1963) 12
Near v. Minnesota, 283 U.S. 697 (1931) 14–15
New York v. Ferber, 458 U.S. 747 (1982) 16, 18–19

PAGE

Roberts v. U.S. Jaycees, 104 S.Ct. 3244 (1984) 20–21

Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981) 16

Secretary of State of Maryland v. Munson, 104 S.Ct. 2839 (1984) 24–25

Singleton v. Wulff, 428 U.S. 106 (1976) 26

Talal v. Fanning, 506 F. Supp. 186 (N.D. Calif. 1980) 20

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 21

Other Authorities:

MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rts.—Civ. Lib. L. Rev. 1 (1985) 17

Selected Provisions of the Code of Indianapolis and Marion County, Indiana[1]

Sec. 16-3(q) "Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section."

Sec. 16-3(g) "*Discriminatory practice* shall mean . . .

* * *

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.

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[1] The entire text of the Amendment is reprinted as Appendix E to the Jurisdictional Statement.

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any products of such performance.

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child or transsexual in a way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination: provided, however, that in the cases under (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3."

Sec. 16-17(b). "In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter."

Motion and Summary of Argument

The Amendment uses a sweeping, unconstitutionally vague, content-based standard effectively to ban the production, sale, exhibition, and distribution of a vast range of non-obscene works that the appellants find offensive. The decisions of the courts below holding the Amendment to be unconstitutional are unassailable. The incurable vagueness of the provisions of the Amendment, as well as its unprecedented and constitutionally impermissible restriction on materials conceded to be within the protection of the First Amendment, mandate affirmance of the judgment below. The appellees move to dismiss the appeal and affirm the judgment below on the grounds that the rulings below are constitutionally correct and this appeal presents no substantial federal question for review.

Statement of the Case

City-County General Ordinances No. 24 and 35, 1984 amending the Human Relations and Equal Opportunity Law appearing in Chapter 16 of the Code of Indianapolis and Marion County (the "Amendment") attempt, by threat of civil sanction, fines and damages, to accomplish what cannot be done directly by criminal law. The Amendment restricts the availability, through the use of a censorship board, of materials that depict or constitute the "sexually explicit subordination of women."[2] Incorporated as part of the Indianapolis-Marion County Civil Rights Law, the Amendment adds new categories of "discriminatory practices" relating to "pornography" (which term is defined with no relationship to its usual meaning), and declares as "unlawful" (§ 16-15) most acts done in connection with the production, sale, exhibition or distribution of such materials.

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[2] . . . whatever that means. See *infra* Point I.

The unique definition of "pornography" (§ 16-3(q)) includes written and pictorial works, as well as speech—whether or not they are protected by the First Amendment—where women are "presented as sexual objects who enjoy pain or humiliation" (§ 16-3(q)(1)), or are depicted as "sexual objects tied up or cut up or mutilated or bruised or physically hurt" (§ 16-3(q)(3)), or are shown in "scenarios of degradation, bleeding, bruised, or hurt in a context that makes these conditions sexual" (§ 16-3(q)(5)). The presentation of women "as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display" is also "pornography" (§ 16-3(q)(6)). To compound the overbreadth and incomprehensibility of this section, the word "women" is said also to apply to "men, children or transsexuals" (§ 16-3(q)).

Virtually everything done in connection with "pornography" is declared unlawful as a "discriminatory practice" (§ 16-15). The restriction specifically prohibits anyone from:

a. producing, selling, exhibiting or distributing "pornography" (§ 16-3(g)(4));

b. coercing, intimidating or fraudulently inducing any person to perform in "pornography" (§ 16-3(g)(5)); or

c. forcing "pornography" upon anyone in a place of employment, education, in a home or any public place (§ 16-3(g)(6)).

Aggrieved persons—including the undefined "woman acting against the subordination of women" (§ 16-17(b))—may file a complaint with either the Board (§ 16-17) or Court (§ 16-28) in order to test the lawfulness of a partic-

ular printed, spoken or visual expression. Then, without reference to any constitutional standards whatsoever, a determination may be made as to whether the expression in question constitutes "pornography" under the Amendment, a positive finding possibly resulting in the issuance of a cease and desist order against further sale, distribution or performance, and the awarding of monetary damages (§ 16-26(d)).

The Amendment also contains a separate provision that establishes a new tort intended to compensate women who have been assaulted (whether or not the assault was criminal in nature) at the expense of legitimate publishers, distributors, sellers, authors and exhibitors of non-obscene materials (§ 16-3(g)(7)). An injured woman—if she can mount a colorable claim that her injury resulted from a specific publication, movie performance, speech, etc.—may sue for damages anyone connected with the creation or distribution of that expression. Specifically what damages are recoverable, or how they are to be proved, is nowhere disclosed.

Finally, whenever a complaint is filed, the Board, acting as a super-regulatory authority, may conduct an independent investigation invoking wide-ranging and ill-defined powers (§ 16-24(1)). It not only may communicate directly with parties charged with a violation, but also may use its governmental position:

> ". . . for the purpose of . . . attempting to resolve or eliminate the alleged discriminatory practice by conciliation or persuasion" (§ 16-24(1)).

If such coercive tactics are unsuccessful, the results of the investigation may be turned over to a panel of the Board for further action (§ 16-24(3)).

On May 1, 1984, prior to the effective date of the Amendment, plaintiffs commenced this action for injunctive and declaratory relief. Preliminary injunctive relief was granted. On June 22, 1984, plaintiffs moved for summary judgment. Oral argument was held on July 30, 1984. On November 19, 1984 the district court (Barker, J.) granted plaintiffs' motion for summary judgment, declared the Amendment "to be unconstitutional, void and of no effect," enjoined enforcement of the Amendment and awarded reasonable attorneys' fees to plaintiffs. The district court found that the Amendment regulates First Amendment protected speech (App. at B-31-32); that the regulation does not fall within any of the permitted exceptions to First Amendment protection (App. at B-38); that the state's interest in eradicating sex discrimination does not justify a new exception (App. at B-42); that the Amendment is unconstitutionally vague (App. at B-46); and that the procedural scheme of the Amendment constitutes an unconstitutional prior restraint (App. at B-51).

Defendants appealed to the Court of Appeals for the Seventh Circuit. On August 27, 1985 that court, in a scholarly opinion by Easterbrook, C.J., joined in by Cudahy, C.J., affirmed the order of the district court; Swygert, S.C.J., while concurring in the opinion, disassociated himself from certain dicta. A petition for rehearing with suggestion for rehearing *en banc* was denied on September 20, 1985.

The Appellees

The appellees publish, produce, distribute, sell and lend books, magazines, and other printed and visual materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. is the major national association of booksellers in the United States. It has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations.

The Council for Periodical Distributors Associations is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the rights of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and

periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Koch News Company is the largest wholesale distributor in Indianapolis of periodicals, hardback and paperback books, Bibles, school and children's books.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,800 college stores located throughout the United States.

Omega Satellite Products Co. is a distributor in Indianapolis of television programming received from satellite transmissions.

Video Shack, Inc. sells and rents motion pictures and other programming on video cassettes at three retail locations in Indianapolis.

Kelly Bentley is an adult resident and citizen of Indianapolis, and a reader and viewer of First Amendment protected material.

POINT I

THE LOWER COURTS PROPERLY FOUND THAT THE AMENDMENT IS IRRETRIEVABLY AND UNCONSTITUTIONALLY VAGUE.

All provisions of the Amendment have as their common denominator the Amendment's definition of "pornography." The extraordinary vagueness of that definition mandates that the entire Amendment be stricken, and thus the rulings below are correct.

"Pornography" is defined in the Amendment as "graphic sexually explicit subordination of women, whether in

pictures or in words, that also includes one or more of the following:

"(1) Women are presented as sexual objects who enjoy pain or humilitation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display."

(§ 16-3(q))

The ambiguities in that definition are numerous, including:

1. "Pornography" is defined, in part, as "subordination of women," but the Amendment does not place that phrase in any context. Perhaps the City-County Council meant to provide that "pornography" is "materials" or "works" that depict "subordination," but that is not what they said, nor what the Amendment provides.

2. "Subordination" is not defined, even though it is the key word in the definition of "pornography." Subordina-

tion means different things to different people. Without any attempt to objectify the term, it is too ambiguous and subjective to have any real meaning. As the district court observed, is it "physical, social, psychological, religious, or emotional subordination or some other form or combination of these"? (App. at B-45)

3. "Subordination" is modified by the phrase "graphic sexually explicit," which is not defined.[3] (§ 16-3(q))

4. The six additional requirements for "pornography" described above are equally subjective and ambiguous, particularly the expressions "presented as sexual objects," "who enjoy . . . humiliation," "presented in scenarios of . . . abasement," "shown as . . . inferior", "conquest" and "postures or positions of servility or submission or display."

5. Further, the Amendment's proscriptions such as the one that makes "trafficking in pornography" (§ 16-31(g)(4)) a violation, are, when coupled with the definition of pornography, incomprehensible. The trafficking section provides that the production, sale, exhibition or distribution of "subordination" is unlawful.

For the key expression of an ordinance to have such significant ambiguities and problems mandates that the

[3] "Sexually explicit" was defined in the original amendment (§ 16-3(bb)), but the definition was deleted in the further amendment signed into law on June 15, 1984, after this action was commenced. The deleted definition stated that "sexually explicit shall mean actual or simulated:

(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between women and animals; or

(2) Uncovered exhibition of the genitals, pubic region, buttocks or anus of any person."

entire Amendment fall. Appellants repeatedly misrepresent the scope of the Amendment and cite materials that likely are obscene (and thus not protected by the First Amendment) to draw attention away from the fact that the Amendment is directed at a vast range of First Amendment protected materials that the supporters of the Amendment find personally offensive.

Appellants erroneously claim that the Amendment applies to materials that "are predominantly narrowed to the presentation of *violent and illegal* acts in a way that makes them erotic." Jur. St. at 12. This claim is simply false. The Amendment's trafficking provision and definition of "pornography" are not in any way restricted to pornography depicting violent and illegal acts.

The "defenses" section of the Amendment is equally incomprehensible. It states:

> "Defenses. Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6) or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of Section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (g)(6) of Section 16-3." (§ 16-3(g)(8))

A potential defendant cannot possibly know what his or her rights are under this provision. In their Jurisdictional Statement, as in their briefs to the lower courts, appellants

continue to revise and rewrite the meaning of the Amendment in ways nowhere to be found in the language of the Amendment. For the first time we are now told:

> "To state the obvious, the burden of proving that materials at issue subordinate women, as opposed to merely expressing the idea that women are or ought to be subordinate, will rest with plaintiffs in real cases. It will be a defense that the materials merely express an *idea about* the subordination of women."

Jur. St. at 17. A review of the "defenses" section of the Amendment (§ 16-3(g)(8)) fails to reveal this "defense" which appellants have invented as a response to the opinion of the Seventh Circuit.

The Amendment is also vague and ambiguous in its other substantive provisions. It uses words and phrases as terms of art without ever defining them. For example, § 16-17(b) creates a new tort in Indianapolis by providing that every woman has a claim under the Amendment "as a woman acting against the subordination of women." No attempt is made to explain how the term "subordination" is meant to be applied, or who can sue whom for what. To compound this problem, in an apparent attempt to avoid equal protection problems, every "man, child, or transsexual" also has a claim if he or she alleges an injury "in the same way that a woman is injured." The section defies comprehension.

Likewise, § 16-3(g)(4)(A) appears to exempt city, state and federally funded libraries, as well as university and college libraries, in which "pornography" is available for study, but subjects those same entities to liability if such materials are contained within a "special display presentation." However, the reference to "available for study"

leaves open the question whether distribution by loan is also exempt. Moreover, what is contemplated by "special display presentation" is nowhere disclosed.

§ 16-3(g)(6) makes "forcing pornography on a person" a discriminatory practice, yet the elements of such a charge are once again nowhere spelled out. This is particularly troublesome since the proscription specifically applies to actions in the home.

Even more serious is § 16-17(a)(6), which permits an injured woman to file a claim against an author, publisher, distributor, seller or producer of printed or visual materials when she can mount a colorable claim that the assault or attack was "directly caused by specific pornography." What that phrase means, or how such a charge is to be proved, is not disclosed. Nevertheless, the woman has a claim for damages, potentially subjecting a laundry list of persons in the chain of publishing or movie distribution to limitless monetary damages for unknown and unspecified injuries.

The exhaustion of remedies provision (§ 16-28) is also ambiguous. It states:

> "Nothing in this chapter shall affect any person's right to pursue any and all other rights and remedies available in any other local, state or federal forum."

One can only assume, based on statements by the authors of the Amendment, that the provision is intended to permit claims under the Amendment to be brought directly in court without the need to first file a complaint with the Board.

It is this sort of vagueness in a law directed at First Amendment protected freedoms that this Court in

NAACP v. *Button*, 371 U.S. 421, 433 (1963) stated cannot be tolerated.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their existence almost as potently as the actual application of sanctions . . . . .
>
> *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.*" (emphasis added)

See also Baggett v. *Bullitt*, 377 U.S. 360, 373 (1964) ("The uncertain meanings of the oaths require the oathtaker to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked . . . free speech may not be so inhibited").

The vagueness of the Amendment's scope is proven out of the mouths of the appellants and supporters of the Amendment. Before the Seventh Circuit, appellants stated that "[s]ex and therefore things which are sexual in nature are within the average adult's experience." (Appellants' Brief at 38.) However, Prof. Catherine A. MacKinnon, the author of the proposed ordinance which led to the Amendment, stated to the district court that pornography, need it be said, does not confine itself to conventional definitions of sex." (Brief of Linda Marchiano

Amicus Curiae at 32). Professor MacKinnon set forth a list of scenes she considers "sexually explicit," including:

1. "womens' bodies ravaged by cancer radiation treatment;"
2. "black womens' skin . . . used and abused," apparently not involving "conventional definitions of sex;" and
3. "a woman is hunted down" and murdered while "'romantic' music from a prior masturbation scene" is playing.

Id. Professor MacKinnon's discussion concludes: "This term 'sexually explicit' acknowledges the sexually dynamic quality of the material without using subjective sexual arousal as a standard for it . . . ." *Id.*

Appellants' sanitized posture before the Seventh Circuit and this Court seeks to conceal the conflicting arguments presented to the district court by the authors and supporters of the Amendment. If the appellants and *amici* in support of the Amendment could not agree below on the scope of the Amendment, how can any bookseller, distributor or publisher hope to comply with the Amendment without eliminating from the marketplace all words and pictures that arguably reveal women in an "inferior" position?

The lower courts thus correctly applied well-established First Amendment principles in reaching their unanimous decisions, and thus this appeal raises no substantial federal question.

POINT II

THE CONSTITUTION CLEARLY PROHIBITS CONTENT-BASED BANS ON FIRST AMENDMENT PROTECTED MATERIALS DEEMED BY SOME TO BE "OFFENSIVE."

The Amendment is a thinly disguised attempt, contrary to all accepted First Amendment principles and authorities, to ban First Amendment protected speech because it expresses views or condones conduct which may be objectionable to a segment of society. This Court has repeatedly held that expressive material that is harmful or hateful to a class of people cannot be banned on that ground.

The acts which concern appellants and which are incorporated in the Amendment's definition of "discriminatory practices" are for the most part already illegal. Some are addressed through the criminal law—such as assault, coercion, etc.—and others through laws prohibiting discrimination on the basis of gender. Non-obscene books, periodicals, motion pictures and other communicative materials depicting women in what some might consider a subordinate role, however offensive or antisocial they may be, remain speech protected by the First Amendment. Labeling First Amendment protected speech "subordination" does not change its nature.

The Amendment strikes at the paramount concept that First Amendment rights cannot selectively be denied. Quoting Madison's "Report on the Virginia Resolution," this Court in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931) stated:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been de-

> cided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits."

At issue in *Near* was a Minnesota statute under which a vituperative anti-Semitic weekly newspaper was banned. This Court in *Near* explained the rationale for not permitting prior restraint when it stated:

> "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited. The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

Near v. *Minnesota*, 283 U.S. at 722. The Amendment has the same impermissible effect of allowing the Indianapolis and Marion County government to "prevent the circulation" of a book, magazine or movie on the ground that "some of its inhabitants . . violently disagree with it." The Amendment permits the Board, after the filing of a citizen's complaint or on its own initiative, to prohibit the distribution of materials if it determines them to fall within the law's uncertain and vague guidelines. It is such censorship that this Court in *Near* said cannot be tolerated.

In *Carey* v. *Population Services, Int'l*, 431 U.S. 678 (1977), this Court reaffirmed that:

> "At least where obscenity is not involved, we have consistently held that the fact that protected speech

> may be offensive to some does not justify its suppression."

431 U.S. at 701. *See also, e.g., Collin* v. *Smith*, 578 F.2d 1197, 1203 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Sambo's Restaurants, Inc.* v. *City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981).

Only speech which constitutes "the lewd and obscene, the profane, the libelous . . . the insulting or fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), or child pornography, *New York* v. *Ferber*, 458 U.S. 747 (1982), may be restricted as outside First Amendment protection. The most closely related category upon which defendants could rely in support of the constitutionality of the Amendment is "obscenity," which is clearly and concededly to be inapplicable.

In *Miller* v. *California*, 413 U.S. 15 (1973), this Court established the three-prong standard which must be satisfied before sexually related material may be restricted as "obscene" and outside First Amendment protection. The test is:

> "(a) [W]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller, 413 U.S. at 24.

The Amendment makes absolutely no attempt to address, let alone comply with, that constitutional test. "Por-

nography," the operative term in the Amendment, contains no "community standard" test, does not require that the material be "patently offensive" or "taken as a whole," and fails to exempt works that have serious "literary, artistic, political or scientific value." The Amendment very clearly is intended to reach constitutionally protected materials, since none of the three prongs of the *Miller* test are present. As the Seventh Circuit noted, "one of the principal drafters of the [Amendment] has asserted, if a woman is subjected, why should it matter that the work has other value?" citing Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rts.—Civ. Lib. L. Rev. 1, 21 (1985). (App. at A-3)

Miller made clear that no sanctions may attach to the distribution of materials containing sex-related references unless the works, taken as a whole, constitute "hard core" pornography. *Miller*, 413 U.S. at 27.

The Amendment, however, restricts far more than "hard core" pornography.[4] The affidavit of Gary Garber of plaintiff Video Shack, Inc., a distributor of motion pictures on video cassettes and video discs, sets forth the following as examples of non-obscene films in his stock which appear to fall within the meaning of "pornography:"

1. "Dressed To Kill." (starring Michael Caine and Angie Dickinson)
2. "Tex" (starring Dudley Moore, Julie Andrews and Bo Derek)
3. "Star 80" (starring Mariel Hemingway and Cliff Robertson)
4. "Body Heat" (starring William Hurt and Kathleen Turner)

[4] The State of Indiana already has criminal statutes banning the importation, distribution, exhibition and sale of obscene material defined in accordance with *Miller*. Ind. Code §§ 35-30-10.1-1 *et seq.*

5. "SWEPT AWAY" (directed by Lina Wertmuller, and starring Giancarlo Giannini and Mariangela Melato)

6. "LAST TANGO IN PARIS" (starring Marlon Brando and Maria Schneider)

The affidavit of Bernard Rath, Executive Director of plaintiff American Booksellers Association, Inc., sets forth the following works of general fiction—many of which have also been made into motion pictures—carried by bookstores throughout the United States which appear to fall within the meaning of "pornography:"

a. John Updike—The Witches of Eastwick

b. Anais Nin—The Delta of Venus

c. Sidney Sheldon—The Other Side of Midnight

d. Judith Krantz—Scruples

e. Various James Bond novels by Ian Fleming

f. Harold Robbins—The Carpetbaggers

Further, as pointed out by Judge Easterbrook for the Court of Appeals, "W.B. Yeats's poem 'Leda and the Swan' (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda) . . . [and] the collected works of James Joyce, D.H. Lawrence, and John Cleland" are apparently banned. (App. at A-7) Since a multitude of other constitutionally protected books and magazines may also run afoul of the Amendment's proscriptions, a dealer will be forced to "cleanse" his stock of all potentially impermissible items, or risk legal action.

Appellants' heavy reliance upon *New York* v. *Ferber*, 458 U.S. 747 (1982), is totally misplaced. It is evident from the opinion of the Court in *Ferber* that the decision rests on

the unique status and "surpassing importance" given to protection of youth in our law. (458 U.S. at 757) In *Ferber*, the Court focused on the susceptibility of children to be exploited in sexual performances to which they could not legally consent.

Moreover, the New York statute at issue in *Ferber* is relatively narrow in scope compared with the vast range of materials apparently prohibited under the Amendment. New York prohibited the promotion of a sexual performance by a child under sixteen years of age involving "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." By contrast, the Amendment prohibits any words or pictures presenting women, for example, as sexual objects "through postures or positions of servility or submission or display." (§ 16-3(q)(6)) The Court neither suggested nor intended that *Ferber* emasculate the First Amendment by creating a broad exception for all cases in which there is claimed to be a "compelling state interest."

While *Ferber* was solely concerned with the welfare of abused children used in sexual performances, the Amendment creates a cause of action whereby "any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured . . . ." (§ 16-17(b)) There is no precedent for such a cause of action.

The Amendment presumes that "all" women are injured by the visual or verbal depiction of certain sexually related or sexually suggestive activities, even if the works in which such depictions appear are within First Amend-

ment protection. Since no particularized injury need be alleged, authors, publishers, distributors, wholesalers and sellers of general circulation materials will be under constant threat of civil action, and "those who do not have the money to litigate or who merely wish to remain cautious and avoid litigation will employ self-censorship." *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 896 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) (CBS documentary allegedly casting hunters in a bad light held not to give rise to a cause of action). *See also, e.g., Church of Scientology of California v. Flynn*, 578 F. Supp. 266 (D. Mass. 1984) (allegedly libelous reference to "Scientologists" held not to give rise to a cause of action by the Church of Scientology on behalf of its members); *Talal v. Fanning*, 506 F. Supp. 186 (N.D. Calif. 1980) (airing of film "Death of a Princess" held not to give rise to a cause of action for defamation of a class of 600 million Muslims).

In an attempt to avoid the impact of the First Amendment, appellants suggest that *Roberts v. U.S. Jaycees*, 104 S.Ct. 3244 (1984), stands for the proposition that the interest of the State in eradicating discrimination based on sex is a superior interest to that embodied in the First Amendment to the Constitution. Jur. St. at 8, 15-16, 22. That suggestion misstates the holding of this Court. In the *Jaycees* case, this Court took pains to point out:

> "On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."

104 S.Ct. at 3253. On its face, the Amendment *does* suppress speech by authorizing the banning of printed ma-

terials, *does* distinguish between prohibited and permitted activity on the basis of viewpoint, and *does* license the City officials to administer the statute on the basis of such constitutionally impermissible criteria. *Roberts* v. *U.S. Jaycees* thus affords appellants no support.

The courts below also properly and unanimously rejected appellants' reliance upon *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); and *Young* v. *American Mini-Theatres, Inc.*, 427 U.S. 50 (1976). The Amendment does not merely impose time, manner or place restrictions such as those in *Pacifica* and *American Mini Theatres*. In expansive and impressionistic language, the Amendment bans all words and pictures which may reveal women in a subordinated position or which may be said to engender a discriminatory attitude against women. Appellants attempt to avoid this pitfall by inventing "a defense that the materials merely express an *idea about* the subordination of women." Jur. St. at 17. *See supra* p. 10. However, this contorted distinction between words and pictures that subordinate women, and words and pictures that express the idea of subordination, cannot alter the fact that the Amendment bans speech on the basis of viewpoint. For example, the Amendment bans the "production, sale, exhibition or distribution" (§ 16-3(q)(4)) of pictures or words that present women "in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." (§ 16-3(q)(5)) The Amendment thus defines the prohibited graphic sexually explicit speech on the basis of the perspective the author adopts. Speech presenting women as "filthy, inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual" is outlawed regardless of the literary, artistic or political qualities of

the work taken as a whole. The Amendment does not ban graphic sexually explicit words or pictures presenting women in positions of dominance or equality. The Seventh Circuit accurately concluded that:

> "[The Amendment] establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images: those who do not, may not."

> "Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious — the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful."

App. at A-10 and A-9.

Contrary to all precedent of this Court, the Amendment selectively bans non-obscene words and pictures on the basis of content that is deemed offensive to one segment of society. The opinions of the district court and Seventh Circuit faithfully adhere to the clear precedent of this Court, and therefore the appellants' Jurisdictional Statement does not raise any substantial question requiring review by this Court.

POINT III

UNDER CLEAR PRECEDENT OF THIS COURT, APPELLEES HAVE STANDING AND STATE A CONCRETE CASE AND CONTROVERSY.

The Amendment regulates and prescribes what books and other First Amendment protected materials may be produced, sold, exhibited and distributed in Indianapolis. By regulating these activities, the Amendment directly affects the Indianapolis bookstore members of plaintiffs American Booksellers Association and National Association of College Stores, the publisher members of the Association of American Publishers whose books are offered for sale in Indianapolis, the International Periodical Distributors Association and Council for Periodical Distributors Association members which distribute magazines and paperback books in Indianapolis, and the individual plaintiffs who distribute, exhibit, sell, read and view First Amendment protected materials. This direct and immediate impact of the Amendment upon the plaintiffs and their members establishes a concrete case and controversy and gives plaintiffs standing to challenge the Amendment.

The United States Supreme Court "has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). Chief Justice Burger noted that, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.*

Where First Amendment rights are at stake, case or controversy and standing requirements have been relaxed so that litigants may preserve rights of free expression. *See Secretary of State of Maryland* v. *Munson*, 104 S.Ct. 2839 (1984) ("where there is a danger of chilling free speech, the concern that constitutional adjudication be avoided wherever possible may be outweighed by society's interest in having the statute challenged"); *see also Broadrick* v. *Oklahoma*, 413 U.S. 601, (1973) (challenge to statute restricting political activities of state civil servants permitted since the statute's existence may discourage persons not before the Court from engaging in protected speech).

The Amendment essentially bans all communicative materials that portray women in a "subordinated" position or may be said to engender a discriminatory attitude against women. The Amendment's proscriptions apply to the production, sale, exhibition and distribution of all communicative materials in Indianapolis. This regulation and proscription of the display of First Amendment protected materials constitutes the direct and immediate injury suffered by plaintiffs. In cases such as this, federal courts consistently have permitted persons situated as are plaintiffs to challenge the constitutionality of state or local statutes. *See, e.g., American Booksellers Ass'n* v. *Hudnut*, 771 F.2d 323 (7th Cir. 1985); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50, 55 (N.D. Ga. 1981).

Prior to, and throughout, the effective life of the Amendment, plaintiffs and their members were engaged in the production, sale, exhibition and distribution of First Amendment protected words and pictures that apparently were banned by the Amendment. The uncontradicted affidavits of Gary Garber and Bernard Rath filed in the district court in support of plaintiffs' motion for summary

judgment, set forth specific First Amendment protected works distributed or sold in the City of Indianapolis by plaintiffs which apparently fall within the scope of the Amendment. Plaintiffs reasonably fear that the Amendment may be enforced against them for trafficking in "pornography" (§ 16-3(g)(4)) and for assault "due to pornography" (§ 16-3(g)(7)).

All of the provisions of the Amendment have as their common denominator the Amendment's definition of pornography. That definition directly applies to appellees through the Amendments' trafficking and assault provisions and therefore that definition was properly before the courts below. Judge Barker found that definition to be unconstitutionally vague; therefore every cause of action based on that definition must fail. Even if plaintiffs-appellees were not to assert standing to challenge the "forcing pornography" provision of the Amendment, that provision must nonetheless fail because the predicate giving rise to that "offense" fails to pass constitutional muster.

Further, less than a year ago this Court held that a litigant may show that a challenged statute substantially abridges the First Amendment rights of other parties not before the court. *Secretary of State of Maryland v. Munson*, 104 S. Ct. 2839 (1984).

> "[W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

104 S.Ct. at 2847-48.

Appellees charge, and the courts below found, that the definition of pornography in the Amendment applies to material protected under the First Amendment. The trafficking and assault provisions of the Amendment give rise to a concrete case and controversy as to the appellees. Having demonstrated an injury in fact under the trafficking provision, appellees have standing to assert the rights of others that are infringed by the Amendment's definition of pornography as applied in the context of "forcing pornography" and "coercion into pornographic performance."

POINT IV

EVEN IF THE ISSUE OF ABSTENTION WERE PROPERLY BEFORE THE COURT, ABSTENTION WOULD NOT BE APPROPRIATE HERE.

The Court has repeatedly stated the general rule "that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106 (1976). Defendants-appellants did not raise the issue of abstention before the district court or in their briefs to the Seventh Circuit. Appellants' fleeting reference to abstention during oral argument before the Seventh Circuit is not proper or adequate to inject the issue of abstention into this action.

Even if abstention had been properly presented to the lower courts, recent precedent of this Court reaffirms that abstention would not be appropriate. Moreover, no state court decision consonant with this Court's First Amendment precedent could alter the lower courts' rulings that the Amendment is irretrievably and unconstitutionally vague.

In *Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. 2321, 2327 (1984), the Court stated:

> "In the abstract, of course, such possibilities [of limiting construction] always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, 'we have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' Zwickler v. Koota, 389 U.S. 241, 251 . . . (1967)."

While the Amendment is "of an uncertain nature," *see supra* Point I, it is not "obviously susceptible of a limiting construction."

In *Brockett* v. *Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985), the Court considered a pre-enforcement facial challenge to a moral nuisance statute. The prosecutor argued in this Court that the courts below should have abstained. This position was rejected by the majority of the Court. In the concurring opinion, Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, stated that, in their view, abstention would be proper in *Brockett*, noting that the contention that the nuisance statute applied to any First Amendment protected expression rested on a "dubious" interpretation.

In contrast, the Amendment bans the production, sale, exhibition or distribution of words and pictures that, for example, present women "as sexual objects . . . through postures or positions of servility or submission or display." (§ 16-3(q)(6)) During oral argument before the district court, defendant-appellants conceded that the Amendment is directed at non-obscene materials that are protected by the First Amendment.

The federal constitutional issues at stake in this action predominate over any remote possibility that a state court

could understand and narrowly construe to be constitutional such terms as "subordination," "sexual objects who enjoy pain or humiliation," "sexual objects who experience sexual pleasure in being raped," "scenarios of degradation, injury, abasement, torture," "shown as filthy or inferior . . . in a context that makes these conditions sexual," or "sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." (§ 16-3(q)).

The Amendment is not "obviously susceptible of a limiting construction," *Midkiff*, *supra*, 104 S.Ct. at 2327. Abstention therefore is not appropriate.[5]

CONCLUSION

Under well-settled precedent of this Court, the language and purpose of the Amendment violates the First Amendment. This appeal raises no substantial question that would warrant this Court's review, and therefore the appeal should be dismissed or affirmed.

Respectfully submitted,

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5. Even if the Amendment were obviously susceptible of a limited construction which would cure its constitutional defects, the appropriate procedure would be for the district court to enjoin enforcement of the Amendment and retain jurisdiction pending the state court's decision. *England* v. *Louisiana State Board*, 375 U.S. 411 (1964).